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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FRANK BURLEY,	:	
		Case No. CIV 94-5748
Plaintiff,	:	Honorable William G. Bassler
v.	:	
AMALGAMATED LOCAL 6,	:	Hearing Date: March 13, 1995
ULLRICH COPPER, INC.,		10:00 a.m.
NATIONAL LABOR RELATIONS BOARD,	:	
Defendants.	:	

BRIEF IN SUPPORT OF
NATIONAL LABOR RELATIONS BOARD'S
MOTION FOR SUMMARY JUDGMENT

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BRIEF IN SUPPORT OF NATIONAL LABOR RELATIONS BOARD'S MOTION FOR SUMMARY JUDGMENT

This case is before the Court on a Complaint filed by Plaintiff, Frank Burley, against the National Labor Relations Board ("the Board"), as well as against Plaintiff's

former employer, Ullrich Copper, Inc. ("the Employer"), and Amalgamated Local 6[1] ("the Union"), the union which represented employees, including Plaintiff, employed at Ullrich Copper, Inc. The Complaint against the Board seeks to compel the Board to release all documents requested by Plaintiff pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. As set forth below, however, the Board has already provided to Plaintiff most of the requested documents. The remaining nine documents, which are described in the Board's Vaughn Index of Documents Withheld, are exempt from disclosure pursuant to either Exemption 5 or Exemption 7(C) of the FOIA, 5 U.S.C. §§ 552(b)(5), 7(C).

BACKGROUND

A. Unfair Labor Practice Proceeding

On October 17, 1991, Plaintiff filed an unfair labor practice charge against the Union with the Board's Region 22 in Newark, New Jersey. The charge alleged that the Union failed to process Plaintiff's grievance against the Employer regarding seniority and bumping rights, in violation of Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. §158(b)(1)(A) (Board Case No. 22-CB-6953). Subsequently, on December 31, 1991, Plaintiff filed another charge against the Union (Board Case No. 22-CB-7027), alleging that the Union failed to provide him a copy of the collective bargaining agreement between the Union and the Employer. Pursuant to Board procedure (see NLRB Casehandling Manual, Part One, Secs. 10050 et seq. (1989), Exhibit 1[2]), a Board agent in

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[1] The full name of the Union is Amalgamated Industrial and Service Workers Union, Local 6, but Plaintiff's Complaint states only "Amalgamated Local 6".

[2] If the Court would like to review further portions of the Board's Casehandling Manual, the Board will of course supply them.

the regional office investigated Plaintiff's charges, including obtaining affidavits from Plaintiff, and contacting witnesses to obtain information concerning the events underlying the charges. As a result of intervening circumstances, however, Plaintiff submitted to the Board requests to withdraw the charges. By letter dated January 15, 1992, the Regional Director of Region 22 approved Plaintiff's withdrawal of the charges. Accordingly, no further action was taken by the Board with regard to those charges.

B. FOIA Request

By letter dated May 18, 1994 to the Regional Director, Plaintiff requested from the Board "copies of the two cases" (Exhibit 2). By cover letter dated June 9, 1994 (Exhibit 3), the Board provided to Plaintiff various documents in the Board's case files for the two charges. As stated in the Board's cover letter, Plaintiff had clarified in a telephone conversation that he was requesting, and accordingly was provided, copies of the unfair labor practice charges and all documents Plaintiff had submitted or received from the regional office in connection with the two cases. Plaintiff was advised that he could request additional documents pursuant to the FOIA. The Board subsequently received a letter from Plaintiff dated June 13, 1994, requesting all documents from Case No. 22-CB-6953, pursuant to the FOIA (Exhibit 4). In response, the Board provided to Plaintiff copies of additional documents, including "[c]orrespondence, formal documents such as collective bargaining agreements, and evidentiary material provided to the NLRB by parties, such as position statements, and other related documents." (Letter of July 6, 1994, Exhibit 5.) The Board explained in its letter to Plaintiff that it would not disclose internal deliberative documents because they were exempt from disclosure under the FOIA. The

Board further explained that Plaintiff could obtain review of the determination to withhold documents by filing an appeal with the Board's General Counsel.

Subsequently, Plaintiff sent the General Counsel a letter dated July 25, 1994, apparently attempting an appeal of the merits of the unfair labor practice charges (Exhibit 6). Plaintiff's letter requested "an investigation and a new hearing," and included a recitation of facts relating to the merits of the unfair labor practice cases. The General Counsel's Office of Appeals responded to Plaintiff on August 12, 1994, treating Plaintiff's letter as an appeal of the limited refusal to disclose documents under the FOIA, since that was the only action subject to appeal (Exhibit 7).[3] The General Counsel denied the appeal for the reasons stated in the Regional Director's letter of July 6, 1994, and further stated, "Except for documents exempt from disclosure by Exemption 5 of the FOIA and routine administrative material, including routing slips, return receipt cards, and NLRB casehandling forms, you have been provided with all the documents you requested. To the extent you are attempting to appeal from the merits of the underlying unfair labor practice charges, these charges were withdrawn on January 15, 1992, and there are no Regional Director final determinations from which an appeal can be filed under the National Labor Relations Board Rules and Regulations."

C. District Court Complaint

On December 12, 1994, Plaintiff filed a Complaint in this Court against the Board, as well as against the Union and the Employer. As against the Board, the

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[3] As Plaintiff had voluntarily withdrawn his unfair labor practice charges, there was nothing remaining to investigate or consider.

Complaint apparently seeks only to have the Board release all documents requested by Plaintiff under the FOIA.[4] In response, the Board has provided to Plaintiff several additional documents which were not previously provided (Feb. 13, 1995 cover letter attached as Exhibit 8).[5] The Board has continued to withhold nine remaining documents, or portions of documents, all of which are exempt from disclosure pursuant to Exemptions 5 or 7(C) of the FOIA. These documents include: internal investigative reports, other internal memoranda and a draft letter created in the course of the Board's deliberations on the unfair labor practice charges; a Board agent's handwritten telephone notes, including notes of witness interviews; and redacted portions of documents containing the name of a third party witness. The Board has provided detailed descriptions of each of the documents in its Vaughn Index filed with this Court.

ARGUMENT

I. DOCUMENTS 1-8 ARE EXEMPT FROM DISCLOSURE UNDER FOIA EXEMPTION 5

Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), permits an agency to withhold from disclosure "inter-agency or intra-agency memorandums or letters which would not be

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[4] The Complaint does not appear to allege any wrongdoing with respect to the Board's acceptance of Plaintiff's withdrawal of the unfair labor practice charges, nor does the Complaint seek any relief based on the merits of the charges, as Plaintiff had requested in his July 25, 1994 appeal letter to the Board's General Counsel. This is not surprising, since it is beyond dispute that this Court lacks jurisdiction to review the General Counsel's decision whether to prosecute an unfair labor practice case. See NLRB v. UFCW, Local 23, 484 U.S. 112, 129 (1987); Vaca v. Sipes, 386 U.S. 171, 182 (1967); Terminal Freight Cooperative Ass'n v. NLRB, 447 F.2d 1099, 1101-02 (3d Cir. 1971), cert. denied, 409 U.S. 1063 (1972).

[5] Most of these additional documents are the "routine administrative material" mentioned in the General Counsel's response to Plaintiff's appeal. The remaining few documents have been disclosed pursuant to the General Counsel's discretionary authority.

available by law to a party . . . in litigation with the agency." This exemption was intended to encompass all documents "normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). Two of the primary privileges which have been held to be incorporated into Exemption 5 of the FOIA are the attorney work-product privilege and the deliberative process privilege. Sears, 421 U.S. at 149. For both privileges the threshold question is whether the documents are "inter-agency or intra-agency memorandums or letters." This threshold requirement is plainly met in the instant case for Documents 1-8, as they all were generated within the agency for agency use only. None of these documents have been disclosed to the public. Rather, they include exchanges between agency personnel used in the agency's decisionmaking process, or internal notes and memos prepared by a Board agent during the investigation of the unfair labor practice charges, for use by the agent or other agency personnel working on the cases. Accordingly, Documents 1-8 meet the threshold requirement of Exemption 5.

A. Documents 1-8 Are Exempt as Attorney Work-Product

The seminal case on attorney work-product is Hickman v. Taylor, 329 U.S. 495 (1947), in which the Supreme Court held that an attorney in a civil suit should not have been ordered to supply opposing counsel with statements he had taken from witnesses in anticipation of litigation. The Court observed:

> In performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways – aptly though roughly

> termed by the Circuit Court of Appeals in this case . . . as the "work product of the lawyer."

329 U.S. at 510-11. Accord Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980) (purpose of privilege is "to protect the adversary trial process itself"); Cities Service Co. v. FTC, 627 F. Supp. 827, 834 (D.D.C. 1984) (privilege protects attorney's "zone of privacy" within which to "prepare legal theories"). The Court in Hickman held that the preservation of the privacy of an attorney's work-product was of such importance to the functioning of our legal system that discovery of information obtained in anticipation of litigation was precluded, absent a showing of compelling need. 329 U.S. at 512. See also Upjohn Co. v. U.S., 449 U.S. 383, 398, 400 (1981).[6]

The Supreme Court first addressed the attorney work-product privilege as incorporated by Exemption 5 of the FOIA in NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). There, the Supreme Court noted that "Congress had the attorney's work product privilege specifically in mind when it adopted Exemption 5 and that such a privilege had been recognized in the civil discovery context by the prior case law." Id. at 154. Subsequently, in FTC v. Grolier Inc., 462 U.S. 19 (1983), the Supreme Court held that the work-product privilege survives beyond the close of the litigation for which the work

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[6] Rule 26(b)(3) of the Federal Rules of Civil Procedure codifies this privilege for attorney work-product material:

> [D]ocuments . . . prepared in anticipation of litigation [are discoverable] . . . only upon a showing that the party seeking discovery has substantial need of the materials . . . and that he is unable without undue hardship to obtain the equivalent of the materials by other means.

product was prepared. Particularly in the case of government agencies that deal with numerous "essentially similar cases," the need to protect an attorney's work-product is as great after a case is closed, for disclosure of attorney work-product provides "the benefit of the agency's legal and factual research and reasoning . . . . Worse yet, [an opposing party] could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled." FTC v. Grolier, 462 U.S. at 30-31 (Brennan, J. concurring). The Court in Grolier further reaffirmed the principle first stated in Sears, that documents which are entitled to qualified privilege in civil discovery are absolutely privileged under the FOIA:

> It makes little difference whether a privilege is absolute or qualified in determining how it translates into a discrete category of documents that Congress intended to exempt from disclosure under Exemption 5. Whether its immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to "routine" disclosure. . . . [W]ork-product materials are immune from discovery unless the one seeking discovery can show substantial need . . . . Such materials are thus not "routinely" or "normally" available to parties in litigation and hence are exempt under Exemption 5.

462 U.S. at 27.

Documents 1-8, described in the Board's Vaughn Index, are all documents created in anticipation of the potential issuance and litigation of an unfair labor practice complaint and fall within the attorney work-product privilege incorporated in Exemption 5. The documents were created in the course of the agency's investigation of the charges and in the course of agency decisionmaking. Thus, the final investigation report (Document 1)

was created by a Board agent,[7] and contains the agent's summary of the issue and facts relevant to the charges of unlawful conduct, and the agent's analysis and recommendation. Pursuant to agency procedure (see NLRB Casehandling Manual, Part One, Sec. 10100 (1989), Exhibit 9), such reports are submitted to other agency personnel for use in deciding the merits of the unfair labor practice case and whether and how to prosecute the alleged wrongdoing. Similarly, the "Withdrawal Memoranda" (Documents 2 and 3) contain the agent's recommendation on whether to permit withdrawal of the unfair labor practice charges, and the reasons for the recommendation. Again, pursuant to agency procedure (see Casehandling Manual, Part One, Sec. 10102, Exhibit 9), such memoranda are used by other agency personnel to decide the disposition of cases. The draft letter (Document 4), contains a handwritten notation that the letter "never issued," and contains a tentative determination on the next step to take with the unfair labor practice charge, which is different than what ultimately occurred. This document thus reflects the Board agent's predecisional thoughts on whether and how the case should be prosecuted. The redacted "remarks" on a file memorandum (Document 5) similarly reflect a Board agent's evaluation of evidence and thoughts on the merits of the unfair labor practice charge. Finally, the telephone notes (Documents 6-8), which were created during the Board agent's investigation of the charges, reflect the agent's "assembling of information" and "sifting

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[7] It is irrelevant whether the Board agent who prepared the documents is an attorney, for it is well-recognized that the work-product privilege protects "material prepared by agents for the attorney as well as those prepared by the attorney himself." United States v. Nobles, 422 U.S. 225, 238-39 (1975). See also United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 966 (3d Cir. 1988) (work-product privilege applicable to documents prepared by attorneys and other government personnel working under the prosecuting attorney's direction).

what he considers to be the relevant from the irrelevant facts." See Hickman v. Taylor, 329 U.S. at 50. All of these documents are typical attorney work-product documents which are not subject to disclosure.[8]

The very documents in issue here, and others like them, have been held by the courts to fall within Exemption 5. See Kent Corp. v. NLRB, 530 F.2d 612, 619-20 (5th Cir. 1976) (Board final investigation reports "express the tentative views of the . . . attorneys who wrote them. . . . They are precisely the sort of predecisional documents that Sears identifies as the intra-agency memoranda mentioned in the FOIA."); Associated Dry Goods Corp. v. NLRB, 455 F. Supp. 802, 810 (S.D.N.Y. 1978) (final investigation report, memoranda with recommendations or opinions communicated to other officials charged with making decisions, and predecisional file memorandum found to fall within Exemption 5); Conoco Inc. v. United States Dep't of Justice, 687 F.2d 724, 728 (3d Cir. 1982) (handwritten notes by agency employee within Exemption 5); Bristol-Myers Co. v. FTC, 598 F.2d 18, 29 (D.C. Cir. 1978) (notes taken by FTC counsel during discovery interviews of expert witnesses "would reveal counsel's 'mental impressions' and

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[8] That documents withheld from disclosure contain recommendations regarding the charging party's request to withdraw the charges does not affect their status as documents prepared "in anticipation of litigation." "[W]ritten evaluations of the evidence necessarily were founded on the assumption that any given charge might become enmeshed in litigation. Insofar as the privilege is meant to provide candid expressions of an attorney's theories and perspectives, it cannot properly be made to turn on whether litigation actually ensued." Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir. 1976). Accord A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 146-47 (2d Cir. 1994) (work-product privilege available where agency prepared documents in anticipation of closing investigation, but before final decision was made).

evaluations of the testimony given."). Accordingly, the Board has properly withheld these documents pursuant to Exemption 5.

B. Documents 1-4 Are Exempt Under the Deliberative Process Privilege

The deliberative process privilege "serves the primary purpose of permitting agency decisionmakers to engage in that frank exchange of opinions and recommendations necessary to the formulation of policy without being inhibited by fear of later public disclosure." Paisley v. CIA, 712 F.2d 686, 697-98 (D.C. Cir. 1983), unrelated portion of opinion vacated, 724 F.2d 201, 204 (D.C. Cir. 1984). See also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1974) ("The point, plainly made in the Senate Report, is that the 'frank discussion of legal or policy matters' in writing might be inhibited if the discussion were made public. . . ." (quoting S. Rep. No. 813, 89th Cong., 1st Sess. at 9 (1965)). As the court explained in J. H. Rutter-Rex Manufacturing Co., Inc. v. NLRB, 473 F.2d 223, 234 (5th Cir.), cert. denied, 414 U.S. 822 (1973), the Board's interest in protecting its processes and deliberations "is grounded in the need to keep the Board's investigatory and prosecutorial functions uninhibited. . . ."

The two requirements for invoking the deliberative process privilege are that the documents in question must be "predecisional" or "antecedent to the adoption of agency policy" (Jordan v. Dep't of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc)), and that the documents must be "'deliberative' in nature, reflecting the 'give-and-take' of the deliberative process and containing opinions, recommendations, or advice about agency policies." Paisley v. CIA, 712 F.2d at 698. The documents listed as Documents 1-4 in the Board's Vaughn Index meet these two criteria and are accordingly exempt from disclosure as deliberative process material. As described above (Part A) and in the Vaughn Index, all

of these documents were created by a Board agent in the course of the agency's deliberations on the unfair labor practice charges, prior to any decision as to whether to issue complaint and prior to the Regional Director's final decision of January 15, 1992 approving withdrawal of the charges. Accordingly, all of these documents are predecisional.[9]

Further, they are typical of documents falling within the deliberative process privilege: "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" Sears, 421 U.S. at 150. The circulation of these documents which occurred among Board agents, and between agents at different levels of authority, is the embodiment of deliberations within the Board. See Associated Dry Goods Corp. v. NLRB, 455 F. Supp. 802, 810-11 (S.D.N.Y. 1978) (internal memoranda with recommendations or opinions communicated to other officials are predecisional and therefore protected by executive (deliberative process) privilege).[10]

Not surprisingly, every court which has addressed the protectability of Board investigation reports and similar memoranda (Documents 1-3) has found that they are exempt under the deliberative process privilege of Exemption 5, if not also as attorney work product. See Wayland v. NLRB, 627 F. Supp. 1473, 1477 (M.D. Tenn. 1986); Marathon

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[9] Documents 1-4 are dated on or before the date of the Regional Director's letter to Plaintiff approving the withdrawal of the charges.

[10] None of these documents are "final opinions" and therefore outside of Exemption 5's protection. See Sears, 421 U.S. at 151-61. The documents were all created in the period leading up to the Regional Director's final decision to approve the withdrawal of the charges.

LeTourneau Co., Marine Div. v. NLRB, 414 F. Supp. 1074, 1080 (S.D. Miss. 1976); Electri-Flex Co. v. NLRB, 412 F. Supp. 698, 703 (N.D. Ill. 1976). Courts have also consistently found that draft documents (Document 4) are necessarily examples of the deliberative process of an agency and are privileged from disclosure under Exemption 5. See Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1569 (D.C. Cir. 1987); Russell v. Department of the Air Force, 682 F.2d 1045, 1048-49 (D.C. Cir. 1982); Coastal States Gas Corp. v. Department of Energy, 617, F.2d 854, 866 (D.C. Cir. 1980). Disclosure of draft documents would "violate the integrity of the decision-making process" and would mislead the public to assume that "a memorandum generated within the agency of the government reflects the position of the agency," rather than the position or opinion of an individual agency employee. Russell v. Department of the Air Force, 682 F.2d at 1048-49. In short, the draft letter and the deliberative memoranda created during the Board's decisionmaking processes (Documents 1-4) are exempt from disclosure as deliberative process documents.

II. THE NAMES OF INDIVIDUALS WHO PROVIDED INFORMATION TO THE BOARD ARE PROTECTED BY EXEMPTION 7(C)

FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), provides that an agency may withhold "records or information compiled for law enforcement purposes" if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." This language is the result of an amendment to the FOIA[11] which changed the test for disclosure under Exemption 7(C) from the stricter "would constitute" to "could reasonably be expected" to constitute an unwarranted invasion of personal privacy. The

[11] Section 1802 of the Freedom of Information Reform Act of 1986 (Public No. 99-570).

Supreme Court recognized in Department of Justice v. Reporters Committee for Freedom of the Press, 109 S. Ct. 1468, 1473 n.9 (1989), that this change in the language "represents a considered Congressional effort 'to ease considerably a Federal law enforcement agency's burden in invoking [Exemption 7(C)].'"

The Supreme Court in Reporters Committee also reshaped the definition of the public interest in release of agency records which must be balanced with, and must outweigh, the privacy interest in order to result in disclosure under 7(C). In order for there to exist a public interest in disclosure, the information must focus on "'what their government is up to. Official information that sheds light on an agency's performance of its statutory duties falls squarely within statutory purpose." 109 S. Ct. at 1481. Significantly, the Court went on to hold:

> That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case–and presumably in the typical case in which one private citizen is seeking information about another–the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.

Id. Thus, "whether the invasion of a privacy interest is warranted cannot turn on the purposes for which the request for information is made" or "the identity of the requesting party." Reporters Committee, 109 S. Ct. at 1480. Finally, the Court also recognized in Reporters Committee that "private" information under the FOIA is simply information "intended for or restricted to the use of a particular person . . . not freely available to the public." 109 S. Ct. at 1476.

Under these principles, the privacy interest of an individual submitting information to the Board in this case would be invaded by the release of Document 8 and the undisclosed portion of Document 9. Disclosure of these documents would reveal to the Plaintiff the identity of an individual who provided the Board's regional office with information concerning asserted violations of the Labor Act, or is otherwise described as personally involved in the events surrounding the alleged violations. Also included in Document 9 is a description of events believed material to the conduct alleged to be unlawful. Disclosure of this information regarding private citizens involved in a labor dispute "is not what the framers of the FOIA had in mind." 109 S. Ct. at 1477.

Moreover, Plaintiff has not identified the public interest that outweighs the privacy interests identified by the Board in its Vaughn Index, and has not shown that a public interest in disclosure is significant and compelling. Senate of Puerto Rico v. Department of Justice, 823 F.2d 574, 588 (D.C. Cir. 1987). It has been held that "[w]here the requester fails to assert a public interest purpose for disclosure, even a less than substantial invasion of another's privacy is unwarranted." King v. Department of Justice, 586 F. Supp. 286, 294 (D.D.C. 1993), aff'd, 830 F.2d 210 (D.C. Cir. 1987). Nor can Plaintiff assert a valid public interest, as disclosure of the document will not provide "[o]fficial information that sheds light on an agency's performance of its statutory duties . . . ." Id. at 1481. Disclosure would not provide the public with information beyond that already disclosed concerning the General Counsel's investigation of an unfair labor practice charge, but would only supply Plaintiff with the particular identities of individuals involved in the relevant cases.

Courts have found that identities of individuals providing information to the Board are protected from disclosure under Exemption 7(C). See Alirez v. NLRB, 676 F.2d 423, 427 (10th Cir. 1982). Indeed, numerous courts have found that disclosure of the identity of individuals providing information to law enforcement agencies in general constitutes a significant invasion of privacy. See L&C Marine Transport, Ltd. v. United States, 740 F.2d 919, 923 (11th Cir. 1984) (disclosure of identities of employee-witnesses in OSHA investigation could cause "problems at their jobs and with their livelihoods"); New England Apple Council, Inc. v. Donovan, 725 F.2d 139, 144-45 (1st Cir. 1984) (disclosure could have a significant adverse effect on this individual's private or professional life); Kiraly v. FBI, 728 F.2d 273, 278-80 (6th Cir. 1984); Lesar v. United States Dep't of Justice, 636 F.2d 472, 488 (D.C. Cir. 1980) (disclosure might damage reputation or lead to personal embarrassment or discomfort). Accordingly, Documents 9 and 10 in the instant case fall within Exemption 7(C) and have properly been withheld from disclosure.

CONCLUSION

For the foregoing reasons, this Court should grant the Board's motion for summary judgment.

Respectfully submitted,

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Dated: February 15, 1995
Washington, D.C.

[H:\burley\sjmem]

10050–10064 *Investigation*

10050 *Objective:* The purpose of the investigation is to ascertain, analyze, and apply the relevant facts in order to arrive at the proper disposition of the case. Among the items to be considered in the course of the investigation are the following:

a. Legal correctness of details on face of charge, such as proper identification of parties and applicability of section numbers

b. Jurisdiction of the Board (see secs. 11700–11708)

c. Timeliness of the charge

d. Determination of sources of factual materials

e. Gathering of the relevant facts

f. Legal analysis of available factual materials

g. Resolutions of conflicts in available factual materials.

The above order is used advisedly. In appropriate circumstances matters on this list need not be considered if the charge does not merit further action under earlier named factors. Specifically, invalidity of the charge, on the basis of factual errors on its face, obviates an investigation into the merits; so do lack of jurisdiction and untimeliness.

10051 *Time Goals for Processing Cases:* All unfair labor practice cases, priority C cases, and summary judgment 8(a)(5) cases should be processed in accord with the following time objectives:

10100–10116 *Regional Decision*

10100 *Generally:* On completion of the investigation and the necessary legal analysis, a written or oral report should be submitted to the Regional Director who has the final authority and responsibility to reach a decision at the regional level. The Regional Director's final decision is reflected in the dismissal letter, complaint, or other document served on the parties.

On recommendation of the supervisor, or on their own volition, Regional Directors may decide that a case requires full legal research, in which event they may request same. Regional Directors may also decide to hold a meeting or agenda to discuss the issues with members of the regional supervisory staff such as the regional attorney, assistant to the Regional Director, and the supervisor assigned to the case, in addition to the Board agent who conducted the investigation and completed the legal analysis. It is expected, however, that the proportion of cases requiring separate legal opinion or full presentation and discussion at an agenda meeting will be small. The Regional Directors may also utilize subpanels consisting of the Board agent responsible for the investigation and designated members of the supervisory and managerial staff to initially discuss and review certain cases, especially where controlling precedent is clear, to assist him/her in reaching a final decision in such cases.

When the Regional Director determines that a meeting or agenda is appropriate or necessary, the meeting should be held as soon as possible. Except in emergencies, sufficient time should be given to permit the preparation of any necessary reports and analyses of the nature described in sections 10104–10108, and the reading or rereading of such reports and analyses, if in writing, by all participants in advance of the meeting.

The advance reading should eliminate the necessity of a repetition of the facts at the meeting or agenda. The examiner and the attorney responsible for the investigation or legal analysis should be prepared to answer any questions raised. Each person present should fully express his/her views and recommendations. The extent of consideration to be given each case will, of course, vary with its complexity.

On conclusion of the meeting, the Board agent assigned to the case should prepare as promptly as possible a brief memorandum of the

Exhibit 9

discussion that concisely summarizes the meeting and crystallizes the principal issues.

The memorandum should be reviewed by the Board agent's supervisor, and may be circulated to other participants to assure its accuracy. It should then be submitted to the Regional Director to provide a written summary for consideration and evaluation of the relevant facts, arguments advanced, and views expressed by participants, the applicable law and, if appropriate, recommendations as to the remedial relief to be sought. The memorandum may be utilized by the Regional Director in reaching the ultimate determination that is reflected in the dismissal letter, complaint, or other dispositive action taken in the case. However, the Regional Director is not limited by the memorandum and may, where it is deemed appropriate, base this ultimate determination on other or additional grounds.

10102 *Recommended Withdrawals; Approvals:* On receipt of a withdrawal request (whether solicited or not), the Board agent responsible for the progress of the case must make a written or oral report, including a recommendation therein. The report shall include adequate reasons in support of the recommendation.

On receipt of the report, the Regional Director will take appropriate action.

10104 *Recommended Dismissals:* Oral or written reports recommending against formal action, whether based on lack of merit, the promise of certain remedial action by the charged party ("unilateral" settlement agreements), or any other reason, should, as in other cases described above, be prepared by the Board agent responsible for progress of the case. The report should be somewhat more detailed than that involving a withdrawal or an all-party settlement agreement (if it involves a "unilateral" settlement agreement, for example, it should treat with the objections of the charging party to approval of the agreement), but it should be concise. A recital of efforts to procure a withdrawal request should be included.

After review by the supervisor, the report is submitted through appropriate channels for review and recommendations to the Regional Director. The case may be referred to an agenda presentation for further discussion and analysis, as described in section 10100.

5/18/94

To William A. Pascarell: RE Amalgamated-Local-
Ullrich-Copper Inc.

CASE - 22-CB-6953
22-CB-7027

I would like to have copies of the
two cases ~~that~~ I have giving you.

This would be for the court.

Frank Burley
P.O. BOX 5667
Plainfield, NJ

(908) 756-5975

Exhibit 2

June 9, 1994

Mr. Frank Burley
325 Liberty Street
Plainfield, NJ 07060

Dear Mr. Burley:

This will acknowledge receipt of your May 19, 1994 letter requesting copies of the two cases you gave us involving Amalgamated Local 6 (Ullrich Copper, Inc.), Cases 22-CB-6953 and 22-CB-7027. During a subsequent telephone conversation on May 23 with Board agent Sarro, you clarified your May 19 letter by requesting copies of the charges and any documents you submitted or received from this office in connection with these cases.

Enclosed are the following documents:
1) your affidavits dated October 23 and December 31, 1991;
2)Amalgamated Benefit Fund letter dated July 2, 1991;
3) your September 4, November 23, and December 24, 1991 letters to this Agency.
4)your November 7, 1991 and May 8 and 19, 1992 letters to the Union.
5) copies of charges 22-CB-6953 and 22-CB-7027.
6) letter acknowledging charges 22-CB-6953 and 22-CB-7027
7) letter approving your withdrawal of cases 22-CB-6953 and 22-CB-7027 dated January 15, 1992.

You were advised that you could make a request for additional documents under the Freedom of Information Act and agree to assume costs.

Very truly yours,

J. Michael Lightner
Acting Regional Director

Enclosures

Exhibit 3

Frank Burley
P.O. BOX 5667
Plainfield, NJ 07060

June 13, 1994

J. MICHAEL LIGHTNER
NATIONAL LABOR RELATIONS BOARD
970 BROAD STREET
NEWARK, NJ 07102

Subject-Matter
Releasing all
document from case
No. 22-CB-6953

Dear Mr. Lightner:

I am in reciept of your letter dated June 9, 1994 on the two cases as of January 15, 1992.

I Frank Burley request that all documents from case No.22-CB6953 be release from your file under the Freedom of Information Act that I might have this new information for the Supreme Court of the United States I agree to assume costs.

A copy of these documents will go to my attorney in Milburn NJ.

Very truly yours,

Frank Burley

Frank Burley

Phone: (908)756-5975

LEGAL SERVICES PLAN
03071557708

cc. Bernard Kuttner
J. Michael Lightner

Enc.

Exhibit 4

United S Government

NATIONAL LABOR RELATIONS BOARD

Region 22

970 Broad Street - Room 1600

Newark, NJ 07102-2570

July 6, 1994

Mr. Frank Burley
P.O. Box 5667
Plainfield, NJ 07060

Re: FOIA #78-94
Case 22-CB-6953

Dear Mr. Burley:

This is in response to your letter dated June 13, 1994, which was received in this office on June 20, 1994, requesting copies of any additional documents which were not previously provided on June 9, 1994.

Enclosed please find copies of the following documents:

Correspondence, formal documents such as collective bargaining agreements, and evidentiary material provided to the NLRB by parties, such as position statements, and other related documents.

All other documents in the file which you seek are internal NLRB advisory documents used in the decision making process in this case which fall into the following category:

(1) internal deliberative memoranda such as final investigative reports, agenda minutes, file notes containing records of conversations with parties and/or witnesses, and intra-Agency memoranda; and

A request for internal deliberative memoranda must be denied because they are privileged from disclosure under Exemption 5 regardless of whether a case is open or closed. In order to assure that Agency deliberations are carried on in the candid manner necessary for effective decision making, pre-decisional internal memoranda are exempt from disclosure. Renegotiation Board v. Grumman Aircraft Corp., 421 U.S. 168, 184 (1975); Kent Corp. v. NLRB, 530 F. 2d 612 (5th Cir. 1976), cert. denied 429 U.S. 920 (1976). These pre-decisional memoranda are also exempt since they are work product of the attorneys and investigators who prepared them. See NLRB v. Sears Roebuck and Co., 421 U.S. 132, 150-54 (1975).

Exhibit 5

Accordingly, I will not authorize the release of internal deliberative memoranda taken in the above-captioned case.

The undersigned is responsible for the determination that certain of the documents you seek are privileged from disclosure under the Freedom of Information Act.

You may obtain a review of that determination under the provisions of Section 102.117(c)(2)(ii) of the Board's Rules and Regulations by filing an appeal with the General Counsel, National Labor Relations Board, Washington, D.C. 20570, and a copy of the appeal with the undersigned, within twenty (20) days (excluding Saturdays, Sundays and legal holidays) from the receipt of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

There is no cost to you for furnishing this information. I trust that the foregoing is responsive to your inquiry.

Very truly yours,

William A. Pascarell
Regional Director

Enclosures

Frank Burley
P.O. BOX 5667
Plainfield, NJ 07060

July 25, 1994

General Counsel
National Labor Relations Board
Washington, D. C. 20570

Re: FOIA#78-94
Case-22-CB-6953
22-CB-7027

A request for a
new hearing.

General Counsel:

I Frank Burley the petitioner: case now pending in the Supreme Court of the United States. I am appealing this case to the NLRB in Washington, D.C. for an investigation and a new hearing.

Any appeal should contain a complete statement of the reasons upon which it is based.

(1)From March 15, 1991 through January 6, 1992. The contract was withheld by Joseph Girlando President of the Union. The Labor Board Order Joseph Girlando to give a copy of the contract.

(2) From March 15, 1991 through October 22, 1991. Joseph Girlando with the company and a few shop steward BREACH the contract they reduce it from plant wide seniority to department wide seniority in secret. You will find their name on this memorandum of agreement of October 22, 1991.

(3) October 23, 1991 through December 31, 1991 the Labor Board took my Affidvits and this is some of the things we talks about.**taking away my seniority **withholding the contract **refuse to take my grievance. **put me on night and cut my pay twice no other employees was treated that way. You will find this information in the Affidvits.

(4)Joseph Girlando giving up these document on January 6, 1992.Joseph Girlando gave me a copy of the contract, he took my greivance and cut my pay again, he gave me a copy of this memorandum of agreement that was made October 22, 1991 in secret,

Exhibit 6

(5) When Joseph Girlando gave me the contract January 6, 1992 the company laid me off January 25, 1992 with the help of the Union, they went by this memorandum of agreement of October 22, 1991 the one they signed in secret.

(6)January 26, 1992 Joseph Girlando call for a vote on this memorandum of agreement of October 22, 1991, the membership turn it down.

(7) April 6, 1992 Joseph Girlando went before the Arbitrator George Sabatella with his few shop steward and the company to support his invalid memorandum of agreement of October 22, 1991. The members again turn it down

(8)May 11, 1992 I got a letter from Joseph Girlando the letter said we have lost the fight, the company have won this is now an award.

(9)May 14, 1992 I Frank Burley file a complaint against Ullrich Copper Inc. and Amalgamated Local 6 in the United States District Court of Newark, NJ

(10)November 9, 1992 the case went before Judge John C. Lifland, the Judge went in favor of the company and Joseph Girlando with an invalid memorandum..

(11)I Frank Burley petition the case on to the Supreme Court of the United States. This award of May 11, 1992 is forgery it has two different signature. This case is criminal and unconstitutional I request to have an interview with the NLRB because there is more to go into.

TO THE BOARD'S:

Joseph Girlando withheld the contract for 10 Months, doing that time he change it from plant wide seniority to department wide seniority in secret

The company laid me off after I got the contract January 25, 1992 because they sign it to in secret.

After making this invalid memorandum of agreement October 22, 1991. Joseph Girlando ask the membership to vote on it twice.January 26, 1992 & April 6, 1992

We have two different signature on this Awardthat came out of this invalid memorandum of agreement. I am asking the Labor Board and the arbitrator which one is the Arbitrator signature as of May 11, 1992

I am sending the NLRB copies in the case:

1. Arbitrator Award of May 11, 1992 & January 23, 1993 by George Sabatella.

2. Two letter by Judge John C. Lifland.

3. Supreme Court petition for rehearing

4. Joseph Girlando letter September 24, 1991

Very truly yours

Frank Burley

CERTIFICATION OF VERIFICATION AND NON-COLLUSION

I am the plaintiff in the foregoing Complaint. The allegation of the Complaint are ture to the best of my knowledge and belief. The said Complaint is made in truth and in good faith and without collusion for the causes set forth therein.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: July 25, 1994

Frank Burley
(Your Name)

Richard E. Pate

RICHARD E. PATE
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES JUNE 16, 1998

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

August 12, 1994

Mr. Frank Burley
P.O. Box 5667
Plainfield, NJ 07060

Re: FOIA Appeal
Amalgamated Industrial & Service
Workers Local 6 (Ullrich Copper)
Case Nos. 22-CB-6953
22-CB-7027

Dear Mr. Burley:

Your appeal from the Regional Director's partial refusal to provide documents you had requested in the above-captioned cases has been carefully considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter dated July 6, 1994. Except for documents exempt from disclosure by Exemption 5 of the FOIA and routine administrative material, including routing slips, return receipt cards, and NLRB casehandling forms, you have been provided with all the documents you requested. To the extent you are attempting to appeal from the merits of the underlying unfair labor practice charges, these charges were withdrawn on January 15, 1992, and there are no Regional Director final determinations from which an appeal can be filed under the National Labor Relations Board Rules and Regulations.

Yvonne T. Dixon, at the direction of and pursuant to the policies established by the General Counsel, Fred Feinstein, is responsible for the determination that some of the documents you seek are privileged from disclosure under the FOIA.

Judicial review of this determination may be obtained by filing a complaint in the District Court of the United States in the district in which the complainant resides, or in which the records are situated, or in the District of Columbia, as provided in the FOIA, 5 U.S.C. Section 552(a)(4)(B).

Sincerely,

Fred Feinstein
General Counsel

By Yvonne T. Dixon
Yvonne T. Dixon, Director
Office of Appeals

cc: Director, Region 22

Exhibit 7

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

February 13, 1995

Mr. Frank Burley
P.O. Box 5667
Plainfield, New Jersey 07060

Re: Burley v. Amalgamated Local 6, et al.
Case No. 94-5748 (WGB) (D. N.J.)

Dear Mr. Burley:

Enclosed is the National Labor Relations Board's Answer to your Complaint in the above-referenced proceeding. Also enclosed are documents responsive to your Freedom of Information Act request to the Board which have not previously been provided to you. These documents include routine administrative material and some additional documents which are being released pursuant to the General Counsel's discretionary authority. As noted in the Board's Answer, nine remaining documents have been withheld because they are exempt from disclosure under the FOIA. We will soon be filing with the United States District Court for the District of New Jersey a Motion for Summary Judgment in order to obtain a judgment from the Court that the nine documents are not subject to disclosure.

If you have any questions, please feel free to contact us.

Sincerely yours,

MARGERY E. LIEBER
Assistant General Counsel
for Special Litigation
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
Telephone: (202) 273-2930

ERIC G. MOSKOWITZ
Deputy Assistant General Counsel
for Special Litigation

By: Nancy E. Kessler Platt
NANCY E. KESSLER PLATT
Attorney

[h:\splcom\active\Burley\letter4.doc]

Exhibit 8